

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.

Received

DEC 12 2016

Copyright Royalty Board

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

DOCKET NO. 14-CRB-0001-WR
(2016-2020)

REPLY IN SUPPORT OF SOUNDEXCHANGE'S MOTION TO COMPEL SIRIUS XM
TO PRODUCE FORECASTS, BUSINESS PLANS, AND COMPETITION-RELATED
DOCUMENTS

Sirius XM contends that its "financial condition in 2009" forced it to avoid the *Webcasting III* proceeding and instead agree to rates "well above the fair market value of the statutory license." Opp. at 5. SoundExchange seeks to test that claim by showing that, despite a significant change in its financial circumstances, Sirius XM remains willing today to invest in and grow its webcasting business at the current rates (or at higher rates). The evidence that would support this rebuttal is in Sirius XM's current forecasts, financial projections, and business plans, which it refuses to produce on the basis that its current financial condition is not "directly related" to its written direct statement. Sirius XM cannot insulate its current outlook from discovery on this basis because it has put its 2009 financial condition at issue. Similarly, given David Frear's testimony regarding Sirius XM's competitive landscape, the Judges should require Sirius XM to produce documents relating to its competition with interactive services.

I. THE REQUESTED DOCUMENTS ARE DIRECTLY RELATED TO SIRIUS XM'S WRITTEN DIRECT STATEMENT

A. Current Forecasts, Business Plans, and Financial Projections Are Directly Related to Sirius XM's Written Direct Statement.

Sirius XM's sole witness, David Frear, testifies regarding Sirius XM's decision to enter an agreement with SoundExchange in 2009 pursuant to the Webcaster Settlement Act (the "Agreement"). Frear WDT ¶¶ 33-51, 61. Mr. Frear claims that extenuating circumstances prompted Sirius XM to enter the Agreement at above-market rates that it would not normally agree to, and thus offers that it is not an accurate benchmark in this proceeding. *Id.*; Sirius XM Intro. Memo. at 2.

Sirius XM contends that Mr. Frear's testimony regarding its 2009 financial outlook has no relationship to Sirius XM's current financial outlook, and so it need not produce the requested documents. But this argument ignores the clear link in Mr. Frear's testimony between Sirius XM's 2009 financial outlook and its outlook today. Mr. Frear claims that there was something special about Sirius XM's outlook in 2009 that makes it inappropriate to rely on the rates from the 2009 agreement in *this* proceeding. Frear WDT ¶¶ 33-51, 60-61. By contending that its financial outlook in 2009 defined the terms to which it was willing to agree at that time, Sirius XM cannot deny that its *current* financial outlook and expectations define what it would agree to today. Mot. at 5-6. Understanding the differences, if any, between Sirius XM's current expectations and its 2009 expectations could undermine or support the argument that the 2009 Agreement is no longer relevant.

Sirius XM's current financial outlook could show that Mr. Frear is wrong regarding his claim that the 2009 rates represent an above-market rate reached under unique circumstances. For example, as SoundExchange's Motion discusses, Sirius XM claims that one of the reasons it accepted a purportedly above-market rate is because it had a very limited exposure to the 2009

rates—that is, its internet radio service was still a nascent product. *See* Mot. at 5; Frear WDT ¶ 60. But Mr. Frear’s testimony explains that Sirius XM’s internet radio service has changed over the years and has grown to become a way for users to “time shift” Sirius XM’s program and to obtain “personalized” music. Frear WDT ¶¶ 20, 28, 32. Sirius XM’s financial projections could demonstrate that it plans to continue to aggressively invest in its radio service despite the fact that the rates from the 2009 Agreement remain in effect today and through the next year. Similarly, Sirius XM’s financial projections could also show that, despite its relatively greater exposure to the webcasting rates as compared to its exposure in 2009, Sirius XM is *still* willing and able to accept a higher rate than in 2009. In sum, evidence regarding whether—despite Mr. Frear’s testimony—Sirius XM plans to continue to invest in its webcasting business at the current rates (or higher rates) is the key to understanding and testing Mr. Frear’s claim that the 2009 rates were above-market rates caused by a unique set of circumstances.

B. Sirius XM’s View of the Competition from Interactive Services Is Directly Related to its Written Direct Statement.

Sirius XM raises two arguments as to why it should not have to produce documents related to its competition with interactive services. Neither has merit.

First, Sirius XM argues that SoundExchange’s document requests do not encompass Sirius XM’s competition with interactive services. This is incorrect. For instance, SoundExchange’s document requests sought documents that “compare the functionality or pricing of any interactive service or interactive services generally with any non-interactive service or non-interactive services generally.” Mot. at 4 n.4. This request would cover studies in which Sirius XM compared its internet radio service’s functionality or price with Spotify’s functionality or price. Similarly, a presentation that compared Sirius XM’s internet radio service with on demand services in general would be responsive as well. Finally, market research that

showed that interactive services are competing with non-interactive services (like Sirius XM) on technical features would also be responsive. In short, SoundExchange's document requests seek a specific type of document—documents that could show whether and to what extent Sirius XM competes with or in the same market as on demand services.

Second, Sirius XM claims that Mr. Frear did not submit any testimony regarding the competition between interactive and non-interactive services. But Mr. Frear did submit testimony regarding Sirius XM's competitive position. For instance he testifies regarding Sirius XM's introduction of new features and its strategy for "differentiating Sirius XM and driving consumer demand." Sirius XM Intro. Memo. at 2; Frear WDT ¶ 28. SoundExchange should be allowed to explore this testimony and determine whether it is limited to other non-interactive services or whether Mr. Frear's testimony encompassed on-demand services as well.

II. SIRIUS XM'S UNSUPPORTED CLAIMS OF OVERBREADTH AND BURDEN SHOULD BE DISREGARDED.

Sirius XM belatedly attempts to rely on its boilerplate objections that SoundExchange's requests are "overly broad," would pose an "undue burden" and are "non-specific[]." These boilerplate objections do not justify Sirius XM's refusal to produce the requested documents. Almost every one of Sirius XM's Responses & Objections to SoundExchange's First Set of Requests for Production of Documents includes the "undue burden" and "overly broad" objections and approximately half contain the "non-specificity" objection. Olasa Decl. Ex. A (Sirius XM's Responses & Objections to SoundExchange's First Set of Requests for Production of Documents). And Sirius XM never asserted that it intended to stand on these objections in the meet-and-confer process. Olasa Decl. ¶ 6. Sirius XM's own description of that process confirms as much, as does the fact that Sirius XM's November 17, 2014, meet-and-confer letter

to SoundExchange never raised these issues. Opp. at 4; Olasa Decl. Ex. B (Letter from Jackson Toof to Kuruvilla Olasa, dated November 17, 2014).

Sirius XM's complaint appears to be that SoundExchange should not have asked for "all documents" relating to the issues addressed in this Motion. If that formulation is improper, then Sirius XM's own document requests suffer from the same defect. Sirius XM, along with the other Licensee Participants, recently moved to compel the production "of *all documents* related to the negotiation, formation, or analysis of the Sirius XM or NAB Webcaster Settlement Act settlement agreements." See Motion to Compel SoundExchange to Produce Documents in Response to Licensee Participants' First and Second Requests for Production at 9, Dkt. No. 14-CRB-0001 WR (Dec. 8, 2014) (emphasis added). Similarly, Sirius XM's Reply in Further Support of iHeartMedia's Motion to Compel asks the Judges to compel SoundExchange to produce "*all documents* regarding the promotional effect of webcasting services." See Sirius XM's Reply in Further Support of iHeartMedia's Motion to Compel SoundExchange Inc. to Produce Documents in Response to Discovery Requests at 4, Dkt. No. 14-CRB-0001 WR (Nov, 28, 2014) (emphasis added).

If Sirius XM had raised this concern during the meet-and-confer process, SoundExchange could have narrowed the request to include only those final "presentations, memoranda, analyses or studies" that examine the competition between Sirius XM and interactive services. As Sirius XM is aware, the parties have routinely agreed to that narrowing construction of the "all documents" term. But Sirius XM's failure to meet and confer on this issue does not give it any basis to assert these objections now, in particular in the absence of any evidence of the supposed burden Sirius XM contends it would face.

III. CONCLUSION

For the foregoing reasons, the Copyright Royalty Judges should exercise their authority under 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b) to compel Sirius XM to produce documents in the following two categories:

- Sirius XM's forecasts, business plans, and financial projections; and
- Documents related to Sirius XM's competition with interactive services.

Dated: December 12, 2014

Respectfully submitted,

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Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
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RECORDINGS (*WEB IV*)

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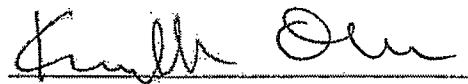
DECLARATION OF KURUVILLA J. OLASA

I, Kuruvilla J. Olasa, declare as follows:

1. I am an attorney with Munger, Tolles & Olson LLP and am counsel for SoundExchange, Inc., in Docket No. 14-CRB-0001-WR (2016-2020).
2. I submit this Declaration in support of SoundExchange's Reply in Support of SoundExchange's Motion to Compel Sirius XM to Produce Forecasts, Business Plans, and Competition-Related Documents.
3. This Declaration is made based upon my personal knowledge.
4. Exhibit A is Sirius XM's Responses & Objections to SoundExchange's First Set of Requests for Production of Documents, dated November 7, 2014.
5. Exhibit B is a copy of a letter from Jackson Toof, counsel for Sirius XM, to me, dated November 17, 2014.
6. During the meet-and-confer process Sirius XM did not suggest that it was standing on its generic objections relating to overbreadth, specificity, or burden.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, information and belief, the foregoing is true and correct.

Dated: December 12, 2014

A handwritten signature in dark ink, appearing to read "Kuruvilla J. Olasa", written over a horizontal line.

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Counsel for SoundExchange, Inc.

Ex. A

EXHIBIT A

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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)

DETERMINATION OF RATES AND TERMS)
FOR DIGITAL PERFORMANCE IN SOUND)
RECORDINGS AND EPHEMERAL)
RECORDINGS (WEB IV))
_____)

Docket No. 14-CRB-0001-WR

**SIRIUS XM RADIO INC.'S RESPONSES AND OBJECTIONS
TO SOUNDEXCHANGE'S FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

Pursuant to 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b), and the discovery schedule agreed to by the participants in the above-captioned proceeding and submitted as Appendix A to the Joint Motion For Issuance Of Discovery Schedule And Alteration Of Case Schedule filed with the Copyright Royalty Judges on July 29, 2014 (the "Discovery Agreement"), Sirius XM Radio Inc. ("Sirius XM" or the "Company") serves its Responses and Objections to SoundExchange's First Set of Requests for Production of Documents (the "Requests").

GENERAL OBJECTIONS

1. SoundExchange is seeking overly broad categories of documents that have little – if any – direct relation to Sirius XM's Written Direct Statement or the testimony of its witness, David J. Frear, submitted in support of the Written Direct Statement, yet would be unduly burdensome for Sirius XM to produce and would cause the Company to bear unnecessary expenses associated with producing responsive documents of little or no evidentiary value. On these grounds, Sirius XM objects to the Requests.

2. Sirius XM objects to the Requests insofar as they seek documents that are not reasonably available. Sirius XM will produce documents and information, including Electronically Stored Information, only to the extent reasonably available.

3. Sirius XM objects to the definition of "Sirius XM" to the extent it purports to seek documents from parties that are neither participants in the *Webcasting IV* proceeding nor have submitted testimony as a part of Sirius XM's written direct statement. In objecting and responding to these Requests, Sirius XM interprets "Sirius XM" to refer only to Sirius XM Radio Inc. and the testimony of its witness, David J. Frear, who submitted testimony as a part of Sirius XM's Written Direct Statement in the *Webcasting IV* proceeding.

4. Sirius XM also objects to the use of the term "all" in seventeen (17) of the twenty-one (21) document requests, as requesting "all documents," "all financial statements," or "all short-term and long-term financial projections, forecasts, budgets or analyses" necessarily includes documents or other materials not directly related to Sirius XM's Written Direct Statement or Mr. Frear's Written Direct Testimony. In responding to SoundExchange's Requests, Sirius XM has conducted and continues to conduct a reasonable and diligent search for documents or other things responsive to the Requests where they are most apt to be found. To the extent that the Requests ask Sirius XM to take any action other than this, Sirius XM objects on the grounds that the Requests are vague, ambiguous, unduly burdensome, and excessively broad.

5. Sirius XM objects to the Requests to the extent they use vague and ambiguous terms and phrases, and to the extent that SoundExchange has failed to define certain terms and/or phrases.

6. Sirius XM objects to the Requests to the extent they seek the disclosure of documents containing information that is protected from disclosure by the attorney-client privilege, the work product doctrine, or by any other applicable privilege or immunity. Production of any privileged or protected document or of any document otherwise subject to objection on any ground does not constitute a waiver of any privilege, protection, or other objection, which may apply to the production of such document or any class or category of documents from which it has been drawn. Pursuant to Section IV.E. of the Protective Order dated October 10, 2014 (the "Protective Order"), Sirius XM reserves the right to recall any document(s) inadvertently produced that is/are protected by the attorney-client privilege, the work product doctrine or any other privilege or immunity from discovery.

7. Sirius XM objects to the Requests to the extent they seek documents or information that are publicly available or already in SoundExchange's possession, custody or control.

8. Sirius XM objects to the Requests to the extent they seek documents or information that are more easily obtained from third parties.

9. Sirius XM objects to the "Instructions" and "Definitions" that are included in the Requests on the ground and to the extent that they are inconsistent with or purport to impose obligations beyond those required by 17 U.S.C. § 803(b)(6)(C)(v) and 37 C.F.R. § 351.5(b) or the Federal Rules of Civil Procedure.

10. Sirius XM objects to the "Instructions" and "Definitions" that are included in the Requests on the ground and to the extent that they purport to impose obligations on non-parties or require Sirius XM to obtain documents from any person or entity over which it has no control.

11. Sirius XM objects to Definition No. 8 to the extent that it broadens the scope of any Request to include documents “having any logical or factual connection with the subject matter.”

12. Sirius XM objects to Instruction No. 12 to the extent it seeks documents “previously within [Sirius XM’s] knowledge, possession, or control.” Sirius XM cannot and will not produce documents or information about which it has no knowledge or over which it has no possession or control. Sirius XM will produce only responsive, non-privileged documents that are within Sirius XM’s current knowledge, possession, or control, or that come into Sirius XM’s possession or control during the pendency of the *Webcasting IV* proceeding.

13. Sirius XM’s objections and responses, or omissions from the same, are not and should not be deemed to be an admission of the existence or non-existence of any documents or information or of the relevance or admissibility of any documents or information produced.

14. Sirius XM reserves the right to make additional objections at any time and to move for modification of the Protective Order.

15. Sirius XM has made, and will continue to make, a good-faith, reasonable effort to search for and retrieve responsive documents and/or information, and reserves the right to supplement its production in response to the Requests.

Sirius XM incorporates the above General Objections into each specific response set forth below as if fully set forth therein. A response to a Request shall not operate as a waiver of any applicable specific or general objection to a Request.

OBJECTIONS AND RESPONSES TO SPECIFIC DOCUMENT REQUESTS

Sirius XM's Responses to the individual document requests below are made subject to, and incorporate by reference as if fully restated therein, Sirius XM's General Objections set forth above.

Document Request No. 1

All documents that concern or relate to the sale of Sirius XM's advertising, as described on page 10 of David Frear's testimony.

Response to Document Request No. 1

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 1 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "Sirius XM's advertising." Sirius XM also objects on the grounds that Request No. 1 is non-specific as to the materials it seeks and not directly related to Sirius XM's Written Direct Statement.

Document Request No. 2

All documents that concern or relate to the use of Sirius XM's Internet radio service by customers to "test drive," timeshift, or complement satellite radio listening, as described on page 12 of David Frear's testimony.

Response to Document Request No. 2

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 2 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "the use of Sirius XM's Internet radio service by customers to 'test drive,' timeshift, or complement satellite radio listening." Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce any responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing the use of Sirius XM's Internet radio service by customers to "test drive," timeshift, or complement satellite radio listening, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 3

All documents concerning or related to Sirius XM's decision to drop all free streaming in or around 2007, as described on page 13 of David Frear's testimony.

Response to Document Request No. 3

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 3 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to a decision made over seven years ago. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce any responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing Sirius XM's decision to drop free streaming in or around 2007, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 4

All documents that discuss, refer to, relate to, or concern the Sirius XM Webcaster Settlement Agreement, as described on pages 13 - 17 of David Frear's testimony, including any documents, communications, or analyses reflecting or concerning any effect on Sirius XM's decision to enter the agreement caused by the "pressure to avoid litigation expenses," the relatively small size of Sirius XM's Internet radio business, or Sirius XM's belief that it was unlikely to obtain lower rates in the *Web III* proceeding.

Response to Document Request No. 4

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 4 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to the "Sirius XM Webcaster Settlement Agreement." Sirius XM also objects to Request No. 4 to the extent it seeks production of documents protected from disclosure by the attorney-client privilege, work product doctrine, or any other applicable privilege or immunity. Moreover, SoundExchange is well aware of how much these copyright royalty rate proceedings cost participants as a general matter. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged documents within its possession, custody and/or control concerning its negotiation or consideration of the Sirius XM Webcaster Settlement Agreement, to the extent that such documents exist and can be located.

Document Request No. 5

Documents sufficient to show, for the period 2011 to 2014, Sirius XM's monthly revenues from Internet radio, total monthly revenues, and number of subscribers that access Sirius XM's Internet radio service on a monthly basis.

Response to Document Request No. 5

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 5 on the grounds that its monthly revenues from services unrelated to its Internet radio service are not directly related to Sirius XM's Written Direct Statement or Mr. Frear's Written Direct Testimony. Sirius XM also objects to Request No. 5 to the extent it seeks subscriber access data prior to January 1, 2012, the production of which would

be unduly burdensome to the Company. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged documents sufficient to show the monthly revenues from its Internet radio service and subscriber data from January 1, 2011, to the present, and will produce responsive, non-privileged documents sufficient to show the number of subscribers that access Sirius XM's Internet radio service on a monthly basis from January 1, 2012, to the present.

Document Request No. 6

All documents that compare the functionality or pricing of any interactive service or interactive services generally with any non-interactive service or non-interactive services generally, including, but not limited to, any analyses, reports, presentations, or projections.

Response to Document Request No. 6

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 6 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "the functionality or pricing of *any* interactive service or interactive services generally with *any* non-interactive service or non-interactive services generally." Sirius XM also objects to Request No. 6 on the grounds that it is not directly related to Sirius XM's Written Direct Statement. Sirius XM further objects to Request No. 6 as vague, ambiguous and non-specific.

Document Request No. 7

All documents that refer to any aspect of competition between any non-interactive service or non-interactive services generally and any interactive service or interactive services generally.

Response to Document Request No. 7

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 7 on the grounds that it is overly broad and unduly burdensome to the extent it seeks “all documents” without regard for the nature of the document as it relates to “*any* aspect of competition between *any* non-interactive service or non-interactive services generally and *any* interactive service or interactive services generally.” Sirius XM also objects to Request No. 7 on the grounds that it is not directly related to Sirius XM’s Written Direct Statement. Sirius XM further objects to Request No. 7 as vague, ambiguous and non-specific.

Document Request No. 8

All documents that concern or relate to any aspect of customization of any non-interactive service.

Response to Document Request No. 8

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 8 on the grounds that it is overly broad and unduly burdensome to the extent it seeks “all documents” without regard for the nature of the document as it relates to “*any* any aspect of customization of *any* non-interactive service.” Sirius XM also objects to Request No. 8 on the grounds that it is not directly related to Sirius XM’s Written Direct Statement. Sirius XM further objects to Request No. 8 as vague, ambiguous and non-specific to the extent the term “customization” is undefined.

Document Request No. 9

All documents that discuss, refer to, or concern the prices of any other interactive or non-interactive service.

Response to Document Request No. 9

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 9 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "prices of any other interactive or non-interactive service." Sirius XM also objects to Request No. 9 to the extent it is duplicative of Request No. 6. Moreover, SoundExchange is well aware of the prices of all interactive and non-interactive services. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce any responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing the prices of any other interactive or non-interactive service, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 10

All documents that discuss, refer to, or concern the impact of terrestrial radio on your Internet radio service.

Response to Document Request No. 10

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 10 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "the impact of terrestrial radio on [Sirius XM's] Internet radio service." Sirius XM also objects to Request No. 10 on the grounds that it is not directly related to Sirius XM's Written Direct Statement. Sirius XM further objects to Request No. 10 as vague, ambiguous and

non-specific to the extent the term "impact" is undefined. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce any responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing the effect of terrestrial radio on Sirius XM's Internet radio service subscriber count, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 11

All documents that concern, relate to, or refer to any impact that your service has on sales or licenses of music or on any other method of distributing music, including CDs, downloads, and interactive streaming services. Such documents include, but are not limited to, documents that concern or relate to the evidence of a direct correlation between performances of an artist's music on Sirius XM and a spike in that artist's record sales as described in Paragraph 12 of Mr. Frear's testimony.

Response to Document Request No. 11

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 11 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "*any* impact that [Sirius XM's] service has on sales or licenses of music or on any other method of distributing music." Sirius XM also objects to Request No. 11 as vague, ambiguous and non-specific to the extent the term "impact" is undefined. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing the impact that Sirius XM's service has on sales or licenses of music or on any other method of distributing music, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 12

All documents, including all studies, forecasts, presentations, research, whether internal or public, concerning, referring to or related to the "willingness to pay for the Company's Internet radio service" as referred to in Paragraph 31 of the written direct testimony of David Frear.

Response to Document Request No. 12

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 12 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to the "willingness to pay for the Company's Internet radio service." Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing the willingness to pay for Sirius XM's Internet radio subscription service, as discussed in Paragraph 31 of the Written Direct Testimony of David Frear, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 13

Documents sufficient to show the user base and usage of Sirius XM's Internet radio service or any predecessor streaming service, on a monthly basis from the date of the initial offering of the Internet radio service to the present, including the total number of users or, if applicable, subscribers; the number of users or, if applicable, subscribers who actually used the Internet radio service, the number of streams of the Internet radio service, and the number of users or subscribers who "log onto the Internet radio service" (as referred to in paragraph 30 of the written testimony of Mr. Frear).

Response to Document Request No. 13

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 13 on the grounds that it is overly broad and unduly

burdensome to the extent it seeks documents on a monthly basis from the date of Sirius XM's initial offering of the Internet radio service to the present, which spans over a decade. Sirius XM also objects to Request No. 13 to the extent it is duplicative of Request No. 5. Sirius XM further objects to Request No. 13 to the extent it seeks subscriber access data prior to January 1, 2012, the production of which would be unduly burdensome to the Company. Moreover, SoundExchange is in possession of Sirius XM's royalty statements, which show how much usage there has been vis-à-vis performances from the launch of Sirius XM's Internet radio service to the present. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged documents sufficient to evidence the number of Internet radio service subscribers who have logged into the Sirius XM Internet radio service on a monthly basis from January 1, 2012, to the present.

Document Request No. 14

All documents, that concern or relate to Sirius XM's "distribution or marketing strategy" with respect to its Internet radio service or any predecessor streaming service as discussed by Mr. Frear at page 12 of his written direct testimony, including all studies, forecasts, presentations, research, communications, whether internal or public, since the offering of the Internet radio service.

Response to Document Request No. 14

In addition to its General Objections, which are incorporated herein by reference, Sirius XM specifically objects to Request No. 14 on the grounds that it is overly broad and unduly burdensome to the extent it seeks "all documents" without regard for the nature of the document as it relates to "Sirius XM's 'distribution or marketing strategy' with respect to its Internet radio service or any predecessor streaming service." Sirius XM also objects to Request No. 14 to the

extent it is duplicative of Request No. 2. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce responsive, non-privileged, formal reports, studies, presentations or memoranda materially discussing Sirius XM's distribution or marketing strategy with respect to its Internet radio service at the time it was launched, within the Company's possession, custody and/or control to the extent that such documents exist and can be located.

Document Request No. 15

All documents referred to, referenced, consulted or otherwise used in connection with the preparation of your response to SoundExchange's First Set of Interrogatories.

Response to Document Request No. 15

SoundExchange did not serve Sirius XM with any Interrogatories.

Document Request No. 16

For the years 2011 through the present, all audited and unaudited financial statements, at every level of specificity at which they are created or maintained, including but not limited to income statements, balance sheets, projections, profit and loss statements, budgets and cash flow statements, together with all supporting schedules, analyses and other materials related to, underlying, or used to support such statements.

Response to Document Request No. 16

Sirius XM objects to Request No. 16 as overly broad, unduly burdensome, non-specific and not directly related to Sirius XM's Written Direct Statement. Sirius XM also objects to Request No. 16 to the extent sufficient financial information concerning Sirius XM is publicly available to SoundExchange. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce audited financial statements for the years 2011 through the present.

Document Request No. 17

Documents sufficient to show, for each year from 2011 to the present, for Sirius XM's non-interactive streaming business and total business, Sirius XM's total annual expenses, each source of expense incurred by Sirius XM and the amount of each such type of expense, including but not limited to expenses from the following categories: (a) royalties for musical composition; (b) royalties for sound recordings; (c) marketing costs; (d) costs associated with promoting artists and recordings; (e) overhead, including, without limitation, salaries, health insurance, telephone, internet, facilities, etc; (e) bandwidth; (f) development and maintenance of technology platform, software and system; (g) licensing fees; (h) third party commissions; and (i) all other significant expenses, identified individually, to the extent not otherwise produced in response to this request.

Response to Document Request No. 17

Sirius XM objects to Request No. 17 as overly broad, unduly burdensome and non-specific. Sirius XM also objects to Request No. 17 on the grounds that it is not directly related to Sirius XM's Written Direct Statement. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce audited financial statements for the years 2011 through the present.

Document Request No. 18

Documents sufficient to show, for each year from 2011 to the present, for Sirius XM's non-interactive streaming business and its total business, Sirius XM's total annual revenues, each source of revenue generated by Sirius XM and the amounts of such types of revenue, including but not limited to revenue from the following categories: (a) subscriptions (broken down by type of subscription); (b) advertising; (c) CD sales; (d) download sales; (e) referral fees; and (f) all other significant revenue, identified individually, to the extent not otherwise produced in response to this request.

Response to Document Request No. 18

Sirius XM objects to Request No. 18 as overly broad, unduly burdensome and non-specific. Sirius XM also objects to Request No. 18 on the grounds that it is not directly related to Sirius XM's Written Direct Statement. Subject to, and without waiving any general or specific objections or applicable privilege or doctrine, Sirius XM responds as follows:

Sirius XM will produce audited financial statements for the years 2011 through the present.

Document Request No. 19

All short-term and long-term financial projections, forecasts, budgets or analyses reflecting the projected future financial condition of Sirius XM up to and including 2020, including but not limited to projections or other forecasts concerning revenues, broken down by category of revenue and year, and costs, broken down by category of cost and year.

Response to Document Request No. 19

Sirius XM objects to Request No. 19 as overly broad, unduly burdensome and non-specific. Sirius XM also objects to Request No. 19 on the grounds that it is not directly related to Sirius XM's Written Direct Statement.

Document Request No. 20

All documents or presentations provided to potential or actual investors, financial or investment analysts, Board of Directors, or any others concerning the projected costs, revenues, financial condition, business plans and strategies of Sirius XM or the webcasting industry, as well as materials used in preparation of such documents or presentations, and documents used to prepare for calls or meetings with any such individuals.

Response to Document Request No. 20

Sirius XM objects to Request No. 20 as overly broad, unduly burdensome and non-specific. Sirius XM also objects to Request No. 20 on the grounds that it is not directly related to Sirius XM's Written Direct Statement.

Document Request No. 21

All documents, including but not limited to all communications, studies, reports, research, surveys, projections, and data, that Sirius XM reviewed or relied upon in deriving its proposed royalty rate in this proceeding.

Response to Document Request No. 21

Sirius XM's responsive documents can be found in its Initial Disclosures, which it made on October 10, 2014.

Dated: November 7, 2014

Respectfully submitted,

Sirius XM Radio Inc.

By: 

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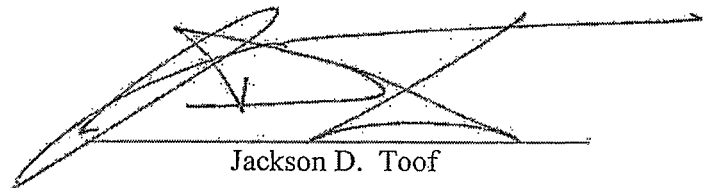
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Jackson D. Toof

Ex. B

EXHIBIT B

CERTIFICATE OF SERVICE


I hereby certify that on December 12, 2014, I caused a copy of **REPLY IN SUPPORT OF SOUNDEXCHANGE'S MOTION TO COMPEL SIRIUS XM TO PRODUCE FORECASTS, BUSINESS PLANS, AND COMPETITION-RELATED DOCUMENTS; DECLARATION OF KURUVILLA J. OLASA** to be served via electronic mail and first-class, postage prepaid, United States mail, to the Participants as indicated below:

Participants

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November 17, 2014

VIA E-MAIL

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Re: Sirius XM's Responses to SoundExchange's First Set of Requests for Production of Documents; Docket No. 14-CRB-0001-WR (2016-2020) (Web IV)

Dear Kuru:

We are following up on our telephone call from Friday, November 14, 2014, and your letter dated November 13, 2014. After our telephone call we went back and reviewed your letter, the requests at issue, the written direct testimony of David Frear, and consulted with our client. Our positions with respect to your four concerns are laid out below.

Forecasts & Business Plans

Request No. 19 seeks "[a]ll short-term and long-term financial projections, forecasts, budgets or analyses reflecting the projected future financial condition of Sirius XM up to and including 2020, including but not limited to projections or other forecasts concerning revenues, broken down by category of revenue and year, and costs, broken down by category of cost and year." Request No. 20 seeks "[a]ll documents or presentations provided to potential or actual investors, financial or investment analysts, Board of Directors, or any others concerning the projected costs, revenues, financial condition, business plans and strategies of Sirius XM or the webcasting industry, as well as materials used in preparation of such documents or presentations, and documents used to prepare for calls or meetings with any such individuals."

During our call you indicated that one of the points in Mr. Frear's testimony is that Sirius XM's Internet business is offered as a way to test drive the satellite components, and that to the extent any forecasts, budgets, business plans, etc. are commingled or interrelated with the satellite business, SoundExchange is entitled to see those materials. We disagree. Sirius XM has already agreed to produce formal reports, studies, presentations or memoranda discussing subscribers' use of Sirius XM's Internet radio service to "test drive," time shift or complement satellite radio listening. Sirius XM offered no testimony about its current or future financial position, and the

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testimony identified in your letter has nothing to do with it. As a result, Sirius XM will not agree to supplement its document production vis-à-vis Request Nos. 19 and 20.

Competition Documents

Request No. 6 seeks “[a]ll documents that compare the functionality or pricing of any interactive service or interactive services generally with any non-interactive service or non-interactive services generally, including, but not limited to, any analyses, reports, presentations, or projections.” Request No. 7 seeks “[a]ll documents that refer to any aspect of competition between any non-interactive service or non-interactive services **generally** and any interactive service or interactive services **generally**.” (emphasis added)

During our call you commented that the Licensee Participants, which includes Sirius XM, took the position that SoundExchange is expected to go back to its member companies and provide documents referring to terrestrial radio promotion, even though (as you contend) terrestrial radio promotion is not discussed by any of SoundExchange’s witnesses. As it turns out, however, SoundExchange continues to refuse to produce anything related to terrestrial radio, or even to search for *any* promotional or substitutional documents, even for digital music services, at the label level (where the actual employees in charge of promotion and marketing work).

In any event, Sirius XM submitted no testimony on the types of competition requested by SoundExchange in Request Nos. 6 and 7. By contrast, SoundExchange submitted substantial testimony alleging that various types of interactive and non-interactive services compete with and substitute for one another. Moreover, Request Nos. 6 and 7 say nothing about Sirius XM’s competition with other non-interactive services; instead, they ask for documents referring to competition “generally” between interactive and non-interactive services. There is simply no direct relation to Sirius XM’s case. As a result, Sirius XM will not agree to supplement its document production for Request Nos. 6 and 7. However, Sirius XM directs your attention to SXM00000219-296 (Restricted), which contains information responsive to these requests.

Customization

Request No. 8 seeks “[a]ll documents that concern or relate to any aspect of customization of any non-interactive service.”

During our call, you indicated that what you would like to see are documents looking at what Sirius XM does to customize its Internet radio service and what consumers are willing to pay for Sirius XM’s customization. As a preliminary matter, SoundExchange’s actual document request is wildly overbroad and does not even mention Sirius XM’s customized Internet radio offering. In paragraph 28 of Mr. Frear’s testimony, as referenced in your letter, Mr. Frear made a passing AFDOCS/11479643.1

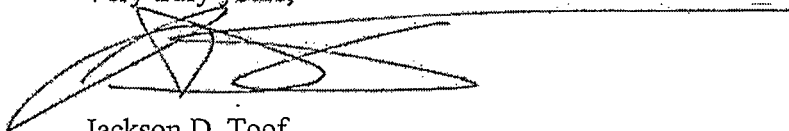
reference to "My Sirius XM," and we have produced documents referring or relating to My Sirius XM and related customization. See, e.g., SXM00000219-296 (Restricted); SXM00000297-303 (Restricted); SXM00002118-2196 (Restricted); SXM00002314-2392 (Restricted); SXM00002393-2414 (Restricted); SXM00002533-2539 (Restricted); SXM00002540-2548 (Restricted). In light of this production, and the tangential nature of Mr. Frear's discussion of My Sirius XM, there is no need for Sirius XM to supplement its document production further.

Advertising

Request No. 1 seeks "[a]ll documents that concern or relate to the sale of Sirius XM's advertising, as described on page 10 of David Frear's testimony."

During our call, you indicated that you want to see documents that involve Sirius XM's attempts, if any, to sell advertising on its Internet channels. As we indicated, Sirius XM has already produced its financial statements showing, *inter alia*, how much Sirius XM makes from advertising, and a spreadsheet that shows Sirius XM's revenue from its Internet radio service. Sirius XM does not break out Internet radio advertising from its overall advertising. Moreover, Sirius XM's music channels have no advertising. What little advertising there is comes from the non-music channels. The documents already produced are more than sufficient to test Mr. Frear's limited testimony concerning advertising. It would be extremely burdensome for Sirius XM to search for the types of documents requested during our call, especially in view of the tangential relationship, if any, to Mr. Frear's actual testimony. And, Mr. Frear offered no testimony that Sirius XM tried (or did not try) to sell advertising on its Internet radio channels to anyone. Sirius XM will agree, however, to produce its general advertising presentation that its Advertising Sales Department uses to customize for the particular potential advertiser Sirius XM is trying to reach.

Very truly yours,



Jackson D. Toof

JDT/tlw